

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of )  
 )  
 BRENDA SMITH )  
 ) OAH No. 12-0013-TAX  
 )  
 \_\_\_\_\_ )

**DECISION AND ORDER**

**I. Introduction**

Brenda Smith is appealing an informal conference decision issued on December 14, 2011 that upheld an assessment by the Alaska Department of Revenue’s Tax Division (Division) of \$1,608 in unpaid taxes, \$737.85 in interest, \$1,608 in unlicensed importation penalties, and \$402 in failure-to-file penalties, for cigarettes that she had shipped to Alaska between February of 2007 and October of 2009 from CD2U.<sup>1</sup>

The law does not allow the assessed taxes and interest to be abated. Because the circumstances that led to the penalties, namely the taxpayer’s belief that there were no Alaska taxes due on the cigarettes she purchased over the Internet, are based on her reliance on the representations of the seller and Kentucky tax stamps on the cigarettes, do not meet the strict requirements for a showing of reasonable cause to abate the penalties, the disputed penalties are upheld.

**II. Facts**

The relevant facts in this case are not in dispute. Unless another source is cited, all facts below are drawn from testimony at the recorded hearing.

Ms. Smith does not dispute that in 2007 and 2008 she ordered cigarettes over the Internet. Ms. Smith had those cigarettes delivered to her home in Alaska. Ms. Smith admits that she did not pay any tax to DOR at the time she purchased these cigarettes. Ms. Smith did not have an Alaska license to bring tobacco into the state. Ms. Smith admits that she did not file any tobacco purchase tax returns or pay the tax due.

Ms. Smith was a credible witness. She explained at the hearing that she had purchased cigarettes from CD2U over the Internet. She did not dispute the charges that DOR assessed, but Ms. Smith said that she hoped that the penalties could be reduced. Ms. Smith testified that the

people she spoke with on the phone at CD2U when she purchased the cigarettes told her that the purchases were legal and that tax has already been paid. Ms. Smith explained that the cigarettes that she purchased appeared to have a Kentucky state tax stamp.

Jennifer Kegler, with the DOR, explained at the hearing that DOR's position would be that the Alaska tax was due because the cigarettes were imported to, and consumed in, Alaska even though tax was paid to another state.

At the hearing, DOR explained that the company that sold Ms. Smith the cigarettes was the subject of federal prosecution for failing to comply with the reporting requirements of the Jenkins Act.

### **III. Discussion**

#### **A. *Alaska Cigarette Tax***

Under AS 43.50.090 and AS 43.50.190, the person who first acquires cigarettes in Alaska must pay a tax on each cigarette. In this case, Ms. Smith acquired cigarettes by purchasing them over the Internet from an out-of-state supplier, who paid the Kentucky tax, then shipped them directly to her without paying Alaska tobacco taxes. DOR assessed the Alaska cigarette tax for each of the untaxed cigarettes that Ms. Smith purchased.<sup>2</sup> There is no legal provision that allows DOR to waive the tax charged for the cigarettes that Ms. Smith imported.<sup>3</sup>

The Alaska tobacco tax and licensing requirements apply even when tax has been paid on the cigarettes in another state. The only exception is found in the exemption for personally bringing less than 401 cigarettes per month into Alaska for personal consumption.<sup>4</sup> Someone who has a license to import cigarettes into Alaska, who pays the Alaska tax and then sells the cigarettes outside Alaska, may seek reimbursement from DOR for the Alaska tobacco tax paid on cigarettes that were not consumed in the state.<sup>5</sup> The fact that Kentucky tobacco taxes were paid on the cigarettes Ms. Smith imported to Alaska and consumed does not relieve her of the taxes, interest, or penalties that DOR imposed. The company that sold her those cigarettes may have been able to get reimbursement from the state of Kentucky for the Kentucky tobacco taxes it paid for cigarettes consumed in Alaska if Kentucky has a similar reimbursement provision.

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<sup>1</sup> See Division's Informal Conference Decision at Agency Record pages 1-4.

<sup>2</sup> See Agency Record pages 21-41.

<sup>3</sup> Alaska Statute 43.05.220(a).

<sup>4</sup> Alaska Statute 43.50.090.

<sup>5</sup> Alaska Statute 43.05.335.

The Alaska tobacco tax requirements apply to these cigarettes because they were consumed here.<sup>6</sup>

***B. Interest***

Under AS 43.05.225 interest, compounded quarterly, is charged on any delinquent state tax due. Again, the statute simply states the requirement for interest, giving no alternatives.

The “reasonable cause” defense to the imposition of the Failure-To-Pay penalty, which will be discussed below, does not apply to the interest on delinquent taxes which the Division is required to assess for unlicensed purchases of untaxed cigarettes. There is no provision that allows abatement based on the financial hardship that having to pay interest will cause the taxpayer.<sup>7</sup>

***C. Unlicensed Importation Penalty***

Under AS 43.50.100(d) a person who has untaxed cigarettes shipped into Alaska without first obtaining a license allowing them to do so must pay a penalty of 100% of the tax due, that is, an additional charge equal to the tax on each cigarette. No alternatives to assessing the full penalty appear in the statute. The Division assessed this penalty for each of the untaxed cigarettes that Ms. Smith purchased.<sup>8</sup>

***D. Failure-To-Pay and Failure-To-File Penalties***

There is an additional penalty of five percent of the total tax due for failing to timely file the required tax returns and pay the required tax. Under 15 AAC 50.190, anyone who imports cigarettes must file the required returns. Ms. Smith was required to both timely file returns and pay the tax due.

Under AS 43.50.090(a) those who do not have a license are explicitly made subject to the tax and are also required to pay the tax at the end of the month following the month that the cigarettes were acquired. Under AS 43.05.220(a), this penalty of five percent of the total tax due is assessed if there is a failure to pay a tax when due.

Ms. Smith was, therefore, subject to both the failure-to-file and failure-to-pay penalties under Alaska Statute 43.05.220(a). However, 15 AAC 05.210(c) states that when both the

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<sup>6</sup> Alaska Statute 43.05.300(1).

<sup>7</sup> Alaska Statute 43.50.100 & Alaska Statute 43.05.220(a).

<sup>8</sup> See Agency Record at pages 21-41.

failure-to-file and the failure-to-pay penalties under Alaska Statute 43.05.220(a) apply to the same period of time, only the failure-to-file penalty will be imposed. This five percent penalty is added after each thirty days passes without the tax being paid. This penalty cannot exceed 25% of the total tax due.

***E. Reliance Seller's Representation that Alaska Tax had been paid Was Not Reasonable Cause***

The failure-to-file and failure-to-pay penalties under Alaska Statute 43.05.220(a), which are reduced to just the failure-to-file penalty in this case, must be added unless there was reasonable cause for the failure to pay and file. The definition of "reasonable cause" is found in Alaska Regulation 15 AAC 05.200, which provides:

Reasonable cause for delay

- (a) The civil penalty under AS 43.05.220 will not be imposed if the taxpayer shows reasonable cause for delay in filing the return or paying the tax.
- (b) A taxpayer who wishes to avoid the penalty established by AS 43.05.220 for failure to file a tax return or pay a tax must make an affirmative showing of all facts alleged as a reasonable cause for his or her failure to file the return or pay the tax on time in a written statement containing a declaration that it is made under penalty of perjury. The statement should be filed with the return or filed with the Department of Revenue as soon as possible thereafter. In determining whether the delinquency was due to reasonable cause and not to willful neglect, the department will apply the administrative and judicial interpretations of Internal Revenue Code § 6651 and the Treasury Regulation § 301.6651-1(c).
- (c) Circumstances which may constitute reasonable cause under AS 43.05.220 include, but are not limited to, the following:
  - (1) war, riot, rebellion, act of God or other disaster which rendered it impossible to make the filing or payment or which made delay unavoidable in making the filing or payment; or
  - (2) acts or omissions by a third party which were beyond the control of the person making the filing or payment and which made delay unavoidable in making the filing or payment; or
  - (3) the person took in good faith all steps and precautions reasonably necessary to ensure the timeliness of the filing or payment.

Ms. Smith admits that she had reason to suspect that she was engaged in activity that required her to pay taxes to Alaska. Ms. Smith admitted that this was part of her reason for asking the seller about the propriety of the purchases. At the hearing, Ms. Smith indicated that she was upset with herself for not confirming the representations of the seller regarding the

legality of her purchases.

Based on the facts of this case, Ms. Smith's failure to file returns and pay the tax was not due to reasonable cause. Ms. Smith sincerely regretted having made this mistake. She purchased the cigarettes for her own personal consumption. Ms. Smith did not know that she was supposed to have a license to import tobacco. Unfortunately, Ms. Smith did not take the reasonable step of checking with the State of Alaska to determine what she had to do if she wanted to buy cheap cigarettes over the Internet; instead, she unreasonably relied on the representations of the sales representatives of the company she bought the cigarettes from and the Kentucky tax stamps on the cigarette packaging. The taxation and the regulation of cigarette sales in Alaska should be familiar to anyone who purchases these products in this state. Relying on the representations of an out-of-state seller motivated to make sales and another state tax stamp to ensure that Alaska tobacco taxes have been paid or need not be paid is not a reasonable way to avoid liability for unpaid taxes, interest, and penalties. Ms. Smith seemed to have realized this in hindsight when she testified at the hearing.

#### **IV. Conclusion**

Based on the undisputed facts in the record, the taxes, interest and penalties assessed Ms. Smith by DOR must be upheld.

#### **V. Order**

The Division's Informal Conference Decision in this case, dated December 14, 2011, is AFFIRMED.

### **NOTICE**

1. This is the hearing decision of the Administrative Law Judge under Alaska Statute 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.<sup>9</sup>
2. A party may request reconsideration in accordance with Alaska Statute 43.05.465(b) within 30 days of the date of service of this decision.
3. When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.<sup>10</sup>
4. A party may file a motion for a protective order, showing good cause why specific

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<sup>9</sup> Alaska Statute 43.05.465(f)(1).

<sup>10</sup> Alaska Statute 43.05.470.

information in the record should remain confidential, within 30 days of the date of service of this decision.<sup>11</sup>

5. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Statute 43.05.480 within 30 days of the date this decision becomes final.<sup>12</sup>

DATED this 2<sup>nd</sup> day of October 2012.

By: Signed \_\_\_\_\_  
Mark T. Handley  
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

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<sup>11</sup> Alaska Statute 43.05.470(b).

<sup>12</sup> Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.